

AN EXTENSIVE STUDY OF RAPE LAWS IN INDIA

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ABSTRACT

This paper gives a theoretical understanding of anti-rape laws and its evolution, from being a property crime to crime against the bodily integrity of a woman. This paper traces its origin from the English common law and goes on to analyze the landmark cases from Mathura rape case to the recent Kathua rape case which brought about the progressive amendments in anti-rape laws under the Indian Penal Code. It discusses in detail the reforms made by the criminal law amendment act of 1983, 2013 and 2018. It looks into the recommendations made by the Justice Verma Committee on the controversial aspects of gender neutrality, capital punishments etc. It analyzes a series of judgments highlighting the misogynistic approach taken by courts which act as impediment for women while seeking justice even after progressive reforms. It concludes with the suggestion for change from not just the legislative level but also from the social and cultural level.

Keywords: Anti-rape laws, Criminal law amendment act, Justice Verma committee.

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INTRODUCTION

Rape is one of the most heinous and barbarous crimes of all time but still it has been a long struggle for it to be defined as a crime against the bodily integrity and sexual autonomy of women. Throughout most of the history women had no rights and were treated as mere property, therefore, rape was viewed as crime only in terms of property violation of another man.²

With the evolving time, there was shift in the cultural beliefs and norms which lead to the significant change in the definition of rape as a crime. The Indian rape laws trace its origin from the English common law and it was in 1860 when the anti-rape laws were first mentioned in IPC. But the seventeenth-century jurist Sir Matthew Hale's comment on rape as "*an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent*"³, shows the prejudiced attitude of colonial courts towards the victims. The assumption that the women may be lying became the reason because of which the trial courts were directed more towards proving the credit of the victim rather than proving the guilt of the accused.⁴ It was focus on her past sexual relations or her virginity which determined the outcome of the case.

Eventually, the anti-rape laws strengthened over the decades because of some brutal cases that led to several major amendments in laws. The need for change in laws gathered momentum with the growth of the Women's Movement which brought about awareness and change in attitude of the society. This paper discusses several cases namely the Mathura rape case, the Delhi rape case, the Unnao and Kathua rape case which led to the criminal law amendments of 1983, 2013, 2018 respectively. It also analyzes the recommendations made by the Justice Verma Committee, which was constituted after the Delhi rape case to suggest reforms in the anti-rape laws. It looks closely into the several changes made in the definition and punishments of anti-rape laws. It focuses specifically on the changes brought about by these amendments in the rape laws under the Indian Penal Code.

² STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/feminism-rape/>, (last visited May 8, 2021).

³ Elizabeth Kolsky, "*The Body Evidencing the Crime*": Rape on Trial in Colonial India, 1860–1947, 22 GENDER & HISTORY, 111 (2010) https://www.researchgate.net/publication/229448954_The_Body_Evidencing_the_Crime'_Rape_on_Trial_in_Colonial_India_1860-1947.

⁴ Ibid

MATHURA RAPE CASE TO DELHI RAPE CASE

With the escalation in crime over the decades, there have been several amendments in the anti-rape laws. The infamous Mathura case created a nationwide uproar which eventually led to The Criminal Law Amendment Act Of 1983.

In the case of *Tukaram And Ors v. State Of Maharashtra*⁵ in 1972, a teenage Adivasi girl named Mathura was alleged to be raped by two policemen while she was in their custody. When the matter reached the sessions court, the judge acquitted the policemen stating that the prosecution had failed to prove its case. The court concluded that she had sexual intercourse while at the police station but there was a “world of difference between sexual intercourse and rape”. It further stated that she was “habituated of sexual intercourse” and thus her consent was voluntary. When the appeal went to High court, it convicted and sentenced the two accused and held that it was a case of “passive submission”. It stated that “*the girl felt helpless in the presence of persons in authority...and inferred that her submission was a result of fear and therefore no consent in the eyes of law*”.⁶ However, the supreme court in its final verdict reversed the judgment and acquitted the policemen on the grounds that “there were no marks of injury on the girl” and the “girl had raised no alarm” which indicated that the alleged intercourse was a “peaceful affair”.

This verdict led to wide scale protest and the four professors Upendra Baxi, Raghunath Kelkar, Lotika Sarkar and Vasudha Dhagamwar wrote an open letter to the Chief justice of India questioning the concept of “consent” in the judgment.⁷ In the letter they drew the distinction between submission and consent which stated, “*Consent involves submission; but the converse is not necessarily true. Nor is absence of resistance necessarily indicative of consent.*”⁸

The letter resulted in the public outcry and a number of feminist groups were formed. A Mumbai based feminist group named Forum against Oppression of Women demanded a review of judgment. It led to mobilization of women’s movement and coordinated

⁵ MANU/SC/0190/1978

⁶ Ibid

⁷ UNRISD RESEARCH REPORT 2016, <https://www.unrisd.org/indiareport-chapter3>, (last visited May 10, 2021).

⁸ AN OPEN LETTER TO THE CHIEF JUSTICE OF INDIA, <https://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-Rape-Case.pdf>, (last visited May 10, 2021).

demonstrations were held in Bombay, Delhi, Nagpur, Pune, Ahmedabad, Bangalore and Hyderabad.⁹

Moreover, the increasing number of custodial rape cases such as the Rameeza Bee case and Maya Tyagi case sparked the debate about the need for change in the rape laws and this led to the legal reforms with the passing of ***The criminal law (second amendment) Act, 1983***. The act brought about significant changes, and sections 376-B, 376-C and 376-D were inserted in order to deal with custodial rape¹⁰. Section 114A was inserted in The Indian Evidence Act, 1872, under which if a girl in her testimony contends that there was no consent given by her then the court shall presume the same and the onus to prove that there was consent lies on the accused.¹¹ The amendment further introduced section 228A in the IPC which dealt with the prohibition of disclosure of the identity of the victim.¹²

In the coming years, the court gave some progressive decisions on rape laws and emphasized that the cases should be dealt with utmost sensitivity. The Supreme Court of India in the case of *The State Of Punjab v. Gurmit Singh & Ors*¹³ on 16 January, 1996 stated, “*Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female.*” Further, owing to the growing criticism of the treatment of the victims in court during their cross-examination, the court was of the opinion that, “*While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime*”

But at the same time, there has been a number of disturbing judgments where courts have shown their regressive and patriarchal mindset, and the accused has been acquitted on unreasonable arguments. In the case of Bhanwari, a Kumhar woman who was trained as a sathin and worked for Women’s Development Project was heavily criticized by upper class men and ostracized for her work on various social issues which challenged orthodox practices like child marriage and as a consequence of which she was gang raped. The

⁹FINOLOGY BLOG, <https://blog.finology.in/recent-updates/evolution-of-anti-rape-laws-in-india>, (last visited May 10, 2021).

¹⁰<http://angulpolice.nic.in/?q=node/396#:~:text=Custodial%20Rape%20%3A,found%20guilty%20of%20committing%20rape>, (last visited May 10, 2021).

¹¹ The Indian Evidence Act, 1872, § 114A, Act, No. 1 of 1872 (India).

¹²LAW TIMES JOURNAL, <https://lawtimesjournal.in/rape-and-its-punishments/>, (last visited May 10, 2021).

¹³MANU/SC/0366/1996.

court acquitted the accused as it was of the view that it is not possible in Indian culture that a man who has taken a vow to protect his wife could have quietly watched his wife being gang-raped¹⁴ and further stated, “an upper-caste man could not have defiled himself by raping a lower-caste woman”.¹⁵

Although Bhanwari Devi struggled almost all her life but never received justice, but it was because of her case that led to a public interest petition in the Supreme Court by activists from Jaipur and Delhi-based organizations. It was propagated that Bhanwari attracted the ire of her rapists solely on the basis of her work¹⁶, hence the court prescribed the famous Vishakha Guidelines, laying down norms to protect women from sexual harassment in workplaces.

THE NIRBHAYA RAPE CASE

In 2012, the gruesome Delhi rape case shook the whole country with the brutal gang rape of a young woman who was named Nirbhaya by media for not revealing her identity as per section Section 228A (2) of IPC. She was brutally gang raped by six men on a bus in Delhi, and her internal organs were pulled and her private parts were mutilated in a very inhuman manner that caused grave injuries which ultimately annihilated her life.¹⁷ She was treated as an object, an article for experimentation and prey to the pervert proclivity of the six.¹⁸ *"The attitude, perception, the bestial proclivity, inconceivable self-obsession and individual centralism of the six made the young lady to suffer immense trauma and, in the ultimate eventuate, the life-spark that moves the bodily frame got extinguished in spite of availing of all the possible treatment that the medical world could provide."*¹⁹ On 29 December 2012, she succumbed to her injuries and died at a Singapore hospital.

The four defendants were convicted of rape, kidnapping, murder and destruction of evidence in September 2013 and were sentenced to death penalty which was upheld by the Supreme Court in 2017 by stating that the case clearly came within the category of

¹⁴ BBC NEWS, <https://www.bbc.com/news/world-asia-india-39265653>, (last visited May 10, 2021).

¹⁵ Maduli Thaosen, *Bhanwari Devi: A Hero We Failed*, FEMINISM IN INDIA, (May 10, 2021, 6:25 PM), <https://feminisminindia.com/2017/03/03/bhanwari-devi-essay/>.

¹⁶ Ibid

¹⁷ BUSINESS STANDARD, https://www.business-standard.com/article/current-affairs/brutality-of-nirbhaya-gang-rape-sounds-like-story-from-different-world-sc-117050501358_1.html, (last visited May 10, 2021).

¹⁸ Ibid

¹⁹ Ibid

‘rarest of rare case’.²⁰ One of the accused Ram Singh, allegedly committed suicide in Tihar Jail and the juvenile perpetrator was sentenced to three years of punishment in a reform home, as per the provisions of the Juvenile Justice Act.²¹

JUSTICE VERMA COMMITTEE REPORT

The national level demonstration and massive public outrage after the Nirbhaya case led the government to act quickly and as a result Justice J.S. Verma committee was set-up to suggest amendments to criminal laws. The committee made recommendations on a wide range of issues dealing with all kinds of sexual crimes.

The Committee recommended that the exception for marital rape should be removed and stated, “*the relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity*”.²² It made recommendations to the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 and criticized the existing mechanism of Internal Complaints Committees stating that it defeated the purpose of the Bill and recommended setting up of an employment tribunal.²³

With respect to the punishments for rape, the committee was of the view that such offences need to be graded. The committee stated that “*There are instances where the victim/survivor is still in a position from which she can, with some support from society, overcome the trauma and lead a normal life. In other words, we do not say that such a situation is less morally depraved, but the degree of injury to the person may be much less and does not warrant punishment with death.*”²⁴ It took into consideration the view of the Working Group on Human Rights which suggested that “*the murder rate has declined consistently in India over the last 20 years despite the slowdown in the execution of death sentences since 1980.*”²⁵ Hence, the committee was of the opinion that the introduction of death penalty for rape may not have a deterrent effect. The committee also took into account the views of majority of scholars, leaders of women’s organizations, and other stakeholders who strongly submitted that “*the seeking of death*

²⁰ THE HINDU, <https://www.thehindu.com/news/national/nirbhaya-case-four-convicts-hanged-to-death-in-tihar-jail/article31114864.ece>, (last visited May 10, 2021).

²¹ Ibid

²² Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law, 115 (January 23, 2013).

²³ Id. at 128

²⁴ Id. at 246

²⁵ Id. at 250

*penalty would be a regressive step in the field of sentencing and reformation”*²⁶ However, they enhanced the punishment to mean the remainder of life.

The Committee further recommended the insertion of certain offences such as Voyeurism, Stalking and Intentional Touching in the Penal code. It also reviewed the practice of the “two-finger test” during the medical examination of the victim and suggested the scrapping of the test by stating that *“the size of the vaginal introitus has no bearing on a case of sexual assault, and therefore a test to ascertain the laxity of the vaginal muscles which is commonly referred to as the two-finger test must not be conducted. On the basis of this test observations/ conclusions such as 'habituated to sexual intercourse' should not be made and this is forbidden by law”*.²⁷

The committee emphasized on the importance of gender equality and also drafted a separate Bill of Rights for women stating *“Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of violence, exploitation, cruel, inhuman or degrading punishment and treatment targeting women are prohibited”*.²⁸

THE CRIMINAL LAW AMENDMENT ACT 2013

In consonance with the report given by the Justice Verma Committee the Criminal Law Amendment Act 2013 came into force on the 3rd of February, 2013, which introduced comprehensive changes in the Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872.

Under the act, the most important changes were made in the definition of rape laws. Earlier, the law was restricted to only penile-vaginal intercourse but the new amendment substituted the section 375 of IPC and widened its ambit by including any bodily penetration as rape.

The amended section 375 of IPC thus stated that a man is said to commit rape if

“there is penetration of his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or making her to do so with him or any other person; or insertion, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra

²⁶ Id. at 245

²⁷ Id. at 275

²⁸ Id. at 429

or anus of a woman or making her to do so with him or any other person; or manipulating any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or making her to do so with him or any other person; or applying his mouth to the vagina, anus, urethra of a woman or making her to do so with him or any other person.”²⁹

Further an explanation was added in the section which defined consent as “*an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act*”³⁰ Also, the age of consent was raised from 16 to 18 years.

The scope of section 376(2) was expanded to include rape committed by a member of armed forces deployed in an area by the Central or a State Government in such area. The 376 A was inserted according to which if rape caused death or persistent vegetative state of the victim then he shall be punished with rigorous punishment for not less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person’s natural life, or with death. The section 376 B was inserted which made sexual intercourse by husband upon his wife during separation punishable by the term of 2 years which may extend to 7 years and shall also be liable to fine. Section 376 C dealt with sexual intercourse by a person in authority like ones in fiduciary relationship or public servant or manager of a jail or hospital and made it punishable by term of 10 years which may extend to life imprisonment and shall also be liable to fine. A separate section 376 D was introduced which dealt with the offence of gang rape and made it punishable with the rigorous imprisonment for a term of 20 years which may extend to life imprisonment and also fine. Punishment for repeat offences was made under section 376 E which made repeated offenders punished with life imprisonment or death.

The amendment was a historical step taken by the government in order to curb violence against women. Despite the advantages of the amendment, the act was also criticized for not incorporating certain provisions recommended by the Justice Verma Committee such as making rape and sexual assault laws gender-neutral, restriction of politicians facing sexual offence charges from contesting elections and the introduction of marital rape as an offence. The Government passed the act overlooking these much-needed reforms.

²⁹ The Criminal Law (Amendment) Act, 2013, § 375, No. 13 of 2013, (India).

³⁰ Ibid

NEED FOR THE CRIMINAL AMENDMENT ACT, 2018

Despite the progressive reforms in the anti-rape laws, the ground reality of rape cases stayed the same. Almost six years after the Delhi rape case, the mind-numbing Unnao and Kathua rape cases shook the entire nation.

In 2017, a 17-year-old girl, minor girl, was kidnapped and raped by a former BJP LA Kuldeep Singh Sengar, his brother Jaideep alias Atul Singh, and others. The girl's father, was arrested in an arms case. He was allegedly beaten up in the custody and later died.³¹ Later, the victim was severely injured in a car accident and two of her aunts died in the accident. Owing to the seriousness of the case, the Apex court transferred the all cases registered in connection with the Unnao rape incident from Lucknow court to the Delhi court.³² Kuldeep Singh Sengar was convicted for kidnapping and raping by the Delhi High Court. The court asked him to pay Rs 25 lakh to the victim apart from the life sentence.

In 2018, the Unnao rape incident coincided with the infamous Kathua rape case. An 8-year-old girl in Kathua, J&K, was raped by six men for a week after which she was killed.³³ Since the deceased was a Muslim girl and the accused were Hindus, it thus became an issue of communal politics because of which the accused garnered support in the name of religion.³⁴ The apex court had to transfer the case from J&K to Punjab in order to ensure fair trial and the six of the seven accused were convicted.

It was the result of these brutal cases that led to widespread protests that pressured the government to bring about stricter laws against such heinous crimes. Owing to this, the Government passed the Criminal Amendment Act, 2018.

THE CRIMINAL AMENDMENT ACT, 2018

³¹ INDIA TODAY, <https://www.indiatoday.in/news-analysis/story/unnao-rape-and-murder-no-judge-to-hear-kuldeep-singh-sengar-case-1575728-2019-07-31>, (last visited May 11, 2021).

³² HINDUSTAN TIMES, <https://www.hindustantimes.com/india-news/court-verdict-in-unnao-rape-case-against-kuldeep-sengar-likely-today/story-8AvdmEud3OgAV1uaTbHcfl.html>, (last visited May 14, 2021).

³³ FIRSTPOST, <https://www.firstpost.com/india/kathua-rape-and-murder-case-bakarwal-community-protests-in-anantnag-family-of-accused-demands-cbi-probe-4428689.html>, (last visited May 14, 2021).

³⁴ FIRSTPOST, <https://www.firstpost.com/india/kathua-and-unnao-cases-linking-sexual-crimes-with-identity-politics-obstructs-reforms-in-rape-laws-4432221.html>, (last visited May 15, 2021).

The Criminal Amendment Act, 2018 brought about changes in the Indian Penal Code, Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 and the Protection of Children from Sexual Offences Act, 2012.

Under IPC, section 166A, 228A, 376 were amended and three new sections 376AB, 376DA, 376DB were inserted. The sub-section 1 of section 376 has been amended to increase the term for punishment of rape not less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

Further, sub-section 3 has been inserted which prescribes punishment for rape of a woman under sixteen years of age stating rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, and shall also be liable to fine.

Section 376AB has been inserted after section 376A which provides for rigorous imprisonment for a term not less than twenty years, but which may extend to imprisonment for life, and with fine or with death, in cases where a woman who is raped is under 12 years of age.

Section 376DA has been inserted after section 376D which deals with the punishment for gang rape and states that a woman under sixteen years of age is raped by one or more persons constituting a group or have acted in furtherance of a common intention, each of those persons shall be punished with imprisonment for life, and with fine.

Section 376 DB prescribes punishment for gang rape on woman under twelve years of age stating that each of those persons shall be punished with imprisonment for life, and with fine, or with death.

CONTINUING STRUGGLE OF WOMEN IN COURTS

Even after the long painful struggle of women's movement which have led to making of progressive laws, there have been numerous instances where the judgments show the prevailing patriarchal and misogynistic mindsets followed in the court rooms.

The Delhi High Court in the case of *Mahmood Farooqui v. State (Govt of Nct of Delhi)*³⁵ acquitted the accused by overturning the trial court's conviction. The court gave a controversial judgment which examined the concept of consent in a deeply flawed manner stating that a feeble "no" may mean a "yes". *"If the parties are in some kind of prohibited relationship, then also it would be difficult to lay down a general principle that an emphatic "no" would only communicate the intention of the other party. If one of the parties to the act is a conservative person and is not exposed to the various ways and systems of the world, mere reluctance would also amount to negation of any consent. But same would not be the situation when parties are known to each other, are persons of letters and are intellectually/academically proficient, and if, in the past, there have been physical contacts. In such cases, it would be really difficult to decipher whether little or no resistance and a feeble "no", was actually a denial of consent."*³⁶

This shows the flaws in the "no means no" approach taken by courts whereby the sexual intercourse may stop after detecting a "no" from the other party. The issues come when the courts fail to appreciate the communication of "no" or establish that a feeble "no" may mean a yes. Thus, there's a need to shift the approach of courts and adopt a new concept of "yes means yes" while determining the consent in rape cases. In California, Gov. Jerry Brown signed a bill into law and became the first U.S. state to define "yes means yes" law in sexual assault cases on college campuses. This law redefines the concept of consent and requires it to be "an affirmative, conscious and voluntary agreement to engage in sexual activity."³⁷ It shifts from the traditional view of "no means no" to a progressive view of "yes means yes" where the participant can move forward with sexual intercourse only after receiving a "yes" from the other party.

There have been cases where the rape survivors have been advised and compelled by police, courts and family members. The Madhya Pradesh high court ordered granting bail

³⁵MANU/DE/2901/2017.

³⁶ Ibid

³⁷The Guardian, <https://www.theguardian.com/world/2014/sep/29/yes-means-yes-california-sexual-consent>, (last visited May 16, 2021).

to the person who was accused of molesting a woman on the condition that he would get a 'rakhi' tied by her on the day of Raksha Bandhan.³⁸

The Punjab and Haryana High Court granted bail to the accused in the case of *Vikas Garg & Others v. State of Haryana*³⁹ (also known as the Jindal University rape case) and took a very patriarchal notion while making remarks on the character of the victim by describing her conduct as "promiscuous". The court observed that, "*The entire crass sequence actually is reflective of a degenerative mindset of the youth breeding denigrating relationships mired in drugs, alcohol, casual sexual escapades and a promiscuous and voyeuristic world.*"⁴⁰

The Karnataka High Court while granting bail in the case of *Rakesh B v. State of Karnataka*⁴¹ stated, "*after the perpetration of the act she was tired and fell asleep, is unbecoming of an Indian woman; that is not the way our women react when they are ravished.*"

Thus, with the increasing number of brutal cases, the patriarchal mindset of courts which leads to making of such insensitive statements, also adds up to the victim's trauma. It shows us the unfortunate reality of our society where the victims are the ones who are questioned about their morality and have to go through the blame and character assassination for being raped. Our society still tries to educate women about how to dress up in an "appropriate way" in order to stay safe and to defend themselves instead of teaching men about the gravity and consequences of rape.

³⁸ The Wire, <https://thewire.in/law/madhya-pradesh-high-court-bail-raksha-bandhan>, (last visited May 16, 2021).

³⁹ MANU/PH/1163/2017.

⁴⁰ Ibid

⁴¹ CrI. P. No. 2427/2020, order dated 22.06.2020 passed by High Court of Karnataka.

CONCLUSION

Over the years the offence of rape has been an issue which is dealt by government only as a result of public outrage after new and more barbarous incidents take place. Because of this our system still fails to provide the victims a safe and protective environment. Even though there have been progressive reforms in the laws, there are some debated issues such as marital rape, gender neutrality in rape laws etc., as reported by the Justice Verma Committee, which need to be taken into account with immediate effect.

Several cases have brought to attention the ambiguity and inconsistency in the judgments given by the courts. The judgments such as the Farooqui case destroy the efforts of years of reforms and takes us thirty eight years back to the Mathura case. This reflects the deep-embedded patriarchy that exists in our society. The effects of the colonial mindset can still be seen in today's judgments and the status of the women in the society remains the same.

There are a number of cases which are not reported because of the fear of being humiliated by the society. Victims are harassed at every step, from police stations to courtrooms. From the inadequate healthcare system to law enforcement system, every step during the struggle of seeking justice adds up to the trauma of the victims. The society we live in plays a vital role in becoming a barrier in obtaining justice. Thus, the impact of the laws can never be fully realized until and unless the change comes from within the society along with the legislative reforms.